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No. 90-218

In the Supreme Court of the United States

OCTOBER TERM, 1990

ISAAC FOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, who cut down trees on public lands to improve the view from his property, was properly convicted of converting to his use a "thing of value of the United States" under 18 U.S.C. 641.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 901 F.2d 23.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1990. A petition for rehearing was denied on May 7, 1990. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on August 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for District of Maryland, petitioner was con-

victed of converting government property, in violation of 18 U.S.C. 641; and cutting timber growing on the public lands of the United States, in violation of 18 U.S.C. 1852. He was sentenced to 15 days' confinement in a halfway house and ordered to perform 300 hours of community service. He was also fined $20,000 and ordered to make restitution for the destroyed government property.

1. Petitioner owned a house and surrounding property in Maryland's Potomac River Valley, the value of which would nearly double if it had an unobstructed view of the Potomac River. Between petitioner's property and the river, however, lay the C&O Canal National Historic Park, created by Congress in 1971 in order to preserve the wooded area as it had appeared during the time the C&O Canal Company operated the canal. In addition, the United States had obtained in 1977 a scenic easement over petitioner's property that restricted the landowner from cutting down any tree measuring in excess of six inches in diameter at breast height. Petitioner and his wife purchased the property, subject to the easement, in 1982. They were repeatedly informed by National Park Service officials that it would be both illegal and a detriment to a unique environment to cut down trees subject to the easement or within the C&O National Historic Park. Pet. App. 3a-4a, 12a n.4; Gov't C.A. Br. 3-5, 9.

To enhance the value of his property, petitioner nevertheless decided to create a clearing to give the property a view of the Potomac River. In February 1985, he hired Suburban Tree Service to do the work. Petitioner did not tell Gary Ralph, the owner of Suburban Tree Service, about the scenic easement or the boundary line of the C&O Canal National Historic Park, and Ralph believed that the entire area

behind the house belonged to petitioner. Pet. App. 4a-5a; Gov't C.A. Br. 5-7.

After one day's work by Ralph and a crew of four workers, petitioner expressed displeasure because the area was not adequately cleared. He told Ralph that he wanted a good view of the river and directed the crew to cut all the way down to the canal. After petitioner declined to increase his payment for the tree-cutting service, he and Ralph agreed that the crew could leave the cut trees where they fell. Pet. App. 5a; Gov't C.A. Br. 7. Ralph and his crew returned the next day to complete the job. Following petitioner's directions, the crew cut down and left approximately 100 trees within the boundaries of the C&O Canal National Historic Park. They also cut down and left 12 trees on petitioner's property that were subject to the scenic easement. Pet. App. 5a-6a; Gov't C.A. Br. 7-9. An expert witness testified that the replacement value of the trees was in excess of $30,000 and that the natural scene destroyed by cutting down the trees would take approximately 35 years to recreate. Gov't C.A. Br. 9-10.

2. The court of appeals affirmed. Pet. App. 1a-16a. It rejected petitioner's contention that the evidence was insufficient to sustain a conviction under 18 U.S.C. 641 because there was no evidence that petitioner had converted the trees to his own use. Pet. App. 10a-12a. Relying on *Morissette* v. *United States*, 342 U.S. 246 (1952), the court explained that "[c]onversion under Section 641 does not require that the accused actually keep the property for personal use," and that conversion includes "intentional and knowing abuses or unauthorized uses of government property." Pet. App. 11a. The court held that the evidence was sufficient to sustain petitioner's conviction, since "[he] cut down trees valued in excess

of $30,000 to enhance his view and hence the value of his property, substantially and criminally interfering with the government's use of that property." Pet. App. 12a (footnote omitted).[1]

ARGUMENT

Petitioner contends that his conviction under 18 U.S.C. 641 should be reversed because his act of cutting down trees on public lands without depriving the government of possession of the felled trees does not constitute an offense under that Section. Pet. 12-30.

1. The court of appeals correctly concluded that petitioner's act of cutting down the trees located in the C&O Canal National Historic Park constituted a knowing conversion under 18 U.S.C. 641 because it "substantially and criminally interfered with the government's use of that property." Pet. App. 12a. Petitioner's contention to the contrary (Pet. 19-23, 27-30) rests on the premise that the scope of Section 641 is limited by the common law definitions of larceny-type offenses, which were restricted to the theft of personal property. This view further depends on a distinction between standing timber, which the common law considered real property, and severed timber, which the common law considered personal property. Under petitioner's theory, since only the former —standing timber or "real property"—was at issue here, Section 641 cannot apply.

Like the difference in offenses that depended on the determination whether and by whom timber had been

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[1] We agree with petitioner (Pet. 20 n.3) that the court of appeals evidently meant that petitioner substantially and criminally interfered with the government's use of its own property.

cut, the distinction between the character of timber as "real" or "personal" property is "subtle and illogical." *United States* v. *Gemmill*, 535 F.2d 1145, 1149-1150 (9th Cir.), cert. denied, 429 U.S. 982 (1976). By its plain terms, Section 641 is not limited by such distinctions. Rather, it broadly punishes "[w]hoever embezzles, steals, purloins, or knowingly converts to his use * * *, or without authority * * * disposes of any * * * thing of value of the United States or any department or agency thereof."[2] The trees growing in the C&O Canal National Historic Park were clearly "thing[s] of value" to the United States, not merely because of the value of the timber, but because of the wooded scene the trees made possible. Petitioner's destruction of those trees fell within the scope of Section 641.

In accordance with this language, this Court noted in *Morissette* v. *United States*, 342 U.S. 246 (1952), that "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions."[3] *Id.*

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[2] See, *e.g.*, *United States* v. *Hill*, 835 F.2d 759, 763 (10th Cir. 1987) (Section 641 ("codifi[ed] as one crime with wide parameters trespass to property of the government"); *United States* v. *Croft*, 750 F.2d 1354, 1360 (7th Cir. 1984) (scope of Section 641 broader than common law tort foundation, including, *e.g.*, things of intangible value); *United States* v. *May*, 625 F.2d 186, 190-192 (8th Cir. 1980) (similar); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.) (similar), cert. denied, 444 U.S. 871 (1979).

[3] Petitioner misplaces his reliance (Pet. 27) on *Moore* v. *United States*, 160 U.S. 268, 273 (1895), for the proposition that a "thing of value" under Section 641 is narrowly limited to personal property subject to larcency-type offenses at

at 269 n.28. The Court also noted that "[t]he word 'converts' does not appear in any of [§ 641's] predecessors." *Ibid.* Consistently with the district court's jury instruction in this case, the Court later explained (*id.* at 271-272):

> Conversion * * * may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. * * * It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing, or purloining.

Petitioner's act of cutting the trees was a knowing abuse of the government's property for his own benefit and therefore amounted to a conversion within the meaning of Section 641.[4]

2. Contrary to petitioner's contention (Pet. 15-19), the decision of the court of appeals in this case

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common law. The Court in *Moore* was addressing the sufficiency of an indictment charging embezzlement under a predecessor statute. 160 U.S. at 273-274.

[4] There is no merit to petitioner's contention (Pet. 14-15) that the indictment did not charge the offense of conversion of government timber. Count 1 of the indictment charged that petitioner "did knowingly convert, and did without authority, dispose of a thing of value of the United States and of the National Park Service, a department and agency thereof, to wit: 126 trees and saplings, more or less, which had been cut down on lands owned by the United States." Pet. App. 23a.

does not conflict with decisions of the Ninth and Tenth Circuits. In most of the cases on which petitioner relies, the defendants were charged with violating Section 641 by cutting and removing timber from public lands. The principal issue was whether a defendant could be separately charged under 18 U.S.C. 1852 or 1853 for cutting down the timber without improper merger of the offenses; the courts determined that a defendant could be so charged. See *United States* v. *Larsen*, 596 F.2d 410, 411-412 (10th Cir. 1979); *United States* v. *Gemmill*, 535 F.2d 1145, 1149-1150 (9th Cir.), cert. denied, 429 U.S. 982 (1976); *United States* v. *Cedar*, 437 F.2d 1033, 1035-1036 (9th Cir. 1971).[5]

In *Magnolia Motor & Logging Co.* v. *United States*, 264 F.2d 950 (9th Cir.), cert. denied, 361 U.S. 815 (1959), the district court addressed the question whether the stealing and converting of logs, agreed to be the property of the United States, could be punished under Section 641 in light of the fact that it could also be punished under Sections 1852 and 1853. The court asserted that one of the elements distinguishing a Section 641 from a Section 1852 or 1853 offense was that Section 641 applied to personalty, not realty. *United States* v. *Lamb*, 150 F. Supp. 310, 312-314 (N.D. Cal. 1957). The court of appeals, in upholding the conviction, stated that "the cutting and felling of the trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts." The court therefore concluded that the logs were personal property. 264 F.2d at

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[5] Although the court in *Gemmill* assumed that carrying away timber constituted a separate Section 641 offense, 535 F.2d at 1150, it did not determine that there could be no Section 641 offense if the timber were not so transported.

954. Thus, the court of appeals simply addresed the sufficiency of the evidence in the context of the common law rule that it was not larceny to sever trees from property and carry them away in one continuous act, but it was larceny if the severance of the trees and their asportation constituted separate acts. See generally 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.4, at 349-350 (1986).

While noting that the *Magnolia Motor* decision paid "lip service" to the common law treatment of stolen timber, the Ninth Circuit subsequently has rejected the common law distinction between trees that are severed and carried away in one continuous act and those that are cut and carried away in separate steps. See *United States* v. *Gemmill*, 535 F.2d at 1150. In addition, the court has since upheld a ruling that a defendant can be charged in separate counts under Section 641 for cutting down timber and for removing it, although one of the charges should be dismissed after conviction to avoid a multiplicitous indictment. See *United States* v. *Manes*, 420 F. Supp. 1013, 1017-1019 (D. Or. 1973), aff'd without opinion, 549 F.2d 809 (9th Cir. 1977) (Table). Current Ninth Circuit law therefore suggests that trees have value in place and that cutting the trees can be a form of conversion that violates 18 U.S.C. 641.[6]

The Ninth Circuit has not yet had to define the scope of Section 641 in a case in which the Section 641 conviction concerns wood that is not removed nor

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[6] The other case upon which petitioner relies, *United States* v. *Petersen*, 777 F.2d 482 (9th Cir. 1985), cert. denied, 479 U.S. 843 (1986), is inapposite. That case involved a defendant convicted under Section 641 who exceeded the scope of a contract to cut down diseased trees on public lands by cutting down and removing healthy trees.

one in which the cutting itself affects a value—the scenic quality of the forest—distinct from the value of the trees as timber. The Ninth Circuit's decisions are therefore not in conflict with the Fourth Circuit's decision in this case. In any event, to the extent there is tension in the analysis of the Fourth and Ninth Circuit decisions, the infrequency with which this issue has arisen over the past 30 years demonstrates that it is not of sufficient recurring importance to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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